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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

CHARLES DIMRY,

Plaintiff,

v.

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN; THE NFL PLAYER SUPPLEMENTAL DISABILITY PLAN; and DOES 1-10, inclusive,

Defendants.

Case No. 3:16-cv-1413-JD

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF RULE 12(b)(6) MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT

Date: June 8, 2016
Time: 10:00 a.m.
Judge: Hon. James Donato
Courtroom: C – 15th Floor

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INTRODUCTION

Plaintiff Dimry's opposition accuses the Retirement Board of "devis[ing] a uniform system to fraudulently withhold disability benefits from qualified athletes," *i.e.*, "a system that is rigged against disabled, retired, former NFL Players."[1] According to Dimry, the Retirement Board systematically adopts the opinions of untrained neutral physicians "without exercising any discretion," all to "deny benefit claims submitted by disabled athletes nationwide, including Mr. Dimry."[2] These statements embody the breach-of-fiduciary-duty allegations set forth in Count II of Dimry's Complaint; they are demonstrably untrue; and they exemplify the conclusory allegations that the Court should dismiss without a moment's hesitation.

The claim that the Retirement Board utilizes unqualified neutral physicians as part of a nationwide scheme to defraud Players certainly sounds contemptible, but Dimry's Complaint provides utterly no basis for it. The Court need look no further than Count II, which contains nothing but conclusory allegations spun from Dimry's dissatisfaction with the outcome on *his* application for T&P benefits, spread across the board. Count II is devoid of any actual facts supporting the existence of an alleged nationwide scheme, and Dimry does not dispute that. In his opposition, Dimry merely repeats the same conclusory allegations from Count II over and over, as if doing so transforms them into facts that give rise to a plausible claim for relief. Repetition is no cure for Dimry's unsubstantiated allegations.

Dimry's breach-of-fiduciary-duty allegations are particularly problematic not only because they lack factual support, but because they are also factually unsupportable. The allegations ignore the terms of the Plan, which authorize the use of neutral physicians[3] and give the Retirement Board "full and absolute discretion to determine the relative weight to give" any medical information in the administrative record.[4] They are belied by the fact that the Plan

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[1] Pl.'s Opp. to Defs.' Rule 12(b)(6) Mot. to Dismiss ("Pl.'s Opp.," Dkt. 21) at 1.

[2] Pl.'s Opp. at 1.

[3] *See* Plan Doc. (Dkt. 19-2) at 26, Section 5.2(c) (authorizing neutral evaluations); *id*. at 51-52, Section 11.3(describing the selection and duties of neutral physicians).

[4] Plan Doc. at 47, Section 8.9.

routinely awards disability benefits to Players—including Dimry, who in 2008 received partial disability benefits (called Line-of-Duty benefits) based on the findings of a Plan neutral physician.[5] And they overlook the fact that the Plan is a collectively-bargained, Taft-Hartley plan administered by a Retirement Board composed, in part, of former Players appointed by the NFL Players Association, the bargaining party for Players like Dimry.[6] Dimry cannot possibly reconcile his claim with these realities, unless of course Dimry means to say that it is a breach of fiduciary duty for the Retirement Board to consult and rely on Plan neutral physicians only when doing so happens to contradict Dimry's sense of entitlement. If that is Dimry's claim, it only reinforces the Plan's argument that this suit is truly a denial-of-benefits claim under section 502(a)(1)(B) of ERISA, not a breach-of-fiduciary-duty claim under section 502(a)(3).

In sum, if ever there was a breach-of-fiduciary-duty claim that was nothing more than a "repackaged" claim for benefits, Dimry's is it. The Court should dismiss Count II with prejudice: Dimry has not requested leave to re-plead, and re-pleading could not cure the deficiencies inherent in Count II of Dimry's Complaint.

ARGUMENT & AUTHORITIES

I. COUNT II CONTAINS NOTHING BUT CONCLUSORY ALLEGATIONS MASQUERADING AS "FACTS", AND THEREFORE FAILS TO STATE A CLAIM FOR RELIEF.

A. Dimry's Breach-Of-Fiduciary-Duty Claim Falls Woefully Short Of The Federal Pleading Standard.

Dimry says the Plan's argument that Count II of the Complaint fails state a plausible cause of action is based on a misunderstanding of the federal pleading standard.[7] To avoid any further misunderstanding, the Plan will allow the Supreme Court's own words to speak for themselves:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must

[5] *See* Compl. (Dkt. 1) at ¶ 12 (noting that Dimry applied for and received "LOD [Line-of-Duty] disability benefits"); Pl.'s Opp. at 2 ("Mr. Dimry applied for Line of Duty benefits on July 30, 2008, and Defendants approved his application on October 1, 2008.").

[6] *See* Plan Doc. at 1, Introduction (noting the Plan and the benefits it provides are the result of collective bargaining between the NFL Players Association and the NFL Management Council).

[7] Pl.'s Opp. at 5.

> contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." **Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."**
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads **factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged**. The plausibility standard is not akin to a "probability requirement," but it asks for **more than a sheer possibility that a defendant has acted unlawfully**. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. **Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice**. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it **does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions**. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. **Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense**. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."[8]

"[D]raw[ing] on its judicial experience and common sense,"[9] the Court should see that Count II of Dimry's Complaint fails to state a plausible claim for relief. As explained in the Plan's Motion, Count II simply takes each and every one of the reasons why Dimry believes the Retirement Board wrongly denied *his* application for benefits and asserts that the Retirement Board has aggrieved every other participant in the Plan for precisely the same reasons. Count II

[8] *Ashcroft v. Iqbal*, 556 U.S. 662, 677-79 (2009) (citations omitted, emphasis added).

[9] *Iqbal*, 556 U.S. at 679.

permits nothing more "than a sheer possibility that [the Plan] has acted unlawfully" against every other Plan participant because it is nothing more than "naked assertions" that are "devoid of further factual enhancement,"[10] such as (i) the identity of another participant allegedly harmed by the alleged nationwide scheme, or (ii) the most basic details of another instance where Plan neutral physicians allegedly were not provided relevant documents or definitions, or (iii) the names of other allegedly unqualified Plan neutral physicians who are routinely engaged by the Plan.

None of these essential facts are exclusively in the Plan's possession, as Dimry alleges.[11] If Dimry were correct that the Retirement Board's conduct has "affected other Players applying for benefits,"[12] then any one of those other Players would have facts to contribute to Dimry's allegations. The truth is that Dimry's Complaint lacks essential facts because he has *no good faith basis* for his allegations of a nationwide conspiracy to defraud Plan participants in the first place. Dimry will not admit that, however, because he would be admitting that his Complaint violates Rule 11 of the Federal Rules of Civil Procedure.[13]

B. Courts Routinely Dismiss Unsubstantiated Breach-Of-Fiduciary-Duty Claims Like The One Pled By Dimry.

Dimry urges the Court to accept his bare-bones breach-of-fiduciary-duty allegations without question, merely because he has given the Plan sufficient "notice" of the gist of his claims.[14] As the Supreme Court has explained, however, federal notice pleading requires more

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[10] *Iqbal*, 556 U.S. at 678 (quotation marks omitted).

[11] *See* Pl.'s Opp. at 7 (claiming that "Mr. Dimry's claim implicates details surrounding [the Plan's] hired-doctors that are solely within Defendants' possession . . . .").

[12] Pl.'s Opp. at 5.

[13] *See* Fed. R. Civ. P. 11(b) ("By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support . . . .").

[14] *See* Pl.'s Opp. at 7 ("Mr. Dimry has alleged sufficient facts to give fair notice to Defendants to allow them to defend themselves . . . .").

than labels and conclusions,[15] and for this reason courts routinely dismiss unsubstantiated claims like the one brought by Dimry in Count II of his Complaint.

Dimry's attempt to distinguish *Wise* and *Nalbandian*— prior cases where courts have rejected similarly insufficient claims— falls flat. Dimry says those cases involved "[t]he total, absolute lack of pleading regarding claims beyond the individual['s] claim," and that is "why the court[s] dismissed the claim[s]."[16] Dimry is right about the basis for the courts' dismissals of the plaintiffs' claims in those cases, but he is wrong that his "allegations are in stark contrast to the pleadings at issue" there.[17] In fact, Dimry's allegations in Count II are strikingly similar to the conclusory allegations rejected in *Wise* and *Nalbandian*.

In *Wise*, for example, the plaintiff sought relief on behalf of all plan participants, alleging that the defendants violated their fiduciary duties by "[c]onsciously and unreasonably failing to investigate or evaluate claims fairly or in good faith, instead utilizing the information available to them in a manner calculated to produce a wrongful but plausible sounding justification for denying benefits;"[18] denying legitimate claims "through the use of claims procedures and guidelines designed to increase the level and amount of" denials;[19] "[f]ailing to consult with qualified medical consultants[;]"[20] "failing to act in accordance with the Plan documents[;]"[21] and "failing to properly evaluate claims for benefits[.]"[22] The Ninth Circuit held that the unsupported accusations failed to state a plausible claim for relief:

> While Wise's complaint alleges that the § 1132(a)(2) claim is brought on behalf of, and for the benefit of, the plan and all its

[15] *Iqbal*, 556 U.S. at 678.

[16] Pl.'s Opp. at 6.

[17] Pl.'s Opp. at 6.

[18] 3/11/2008 Compl., *Wise v. Verizon Communications, Inc., et al*., No. 2:08-cv-409 (W.D. Wash.) ("*Wise* Compl.," Ex. A) at ¶ 36(a).

[19] *Wise* Compl. ¶ 36(b).

[20] *Wise* Compl. ¶ 36(c).

[21] *Wise* Compl. ¶ 37.

[22] *Wise* Compl. ¶ 37.

> participants, there are no factual allegations that the Plan Administrators violated their duties with respect to anything other than Wise's individual claim. Although Wise was not required to plead detailed facts to overcome the Plan Administrators' dismissal motion under Federal Rule of Civil Procedure 12(b)(6), the Supreme Court has explained that "a plaintiff's obligation to provide the grounds of [his or her] entitlement to relief requires more than labels and conclusions," and, therefore, "naked assertion[s]" of wrongdoing unaccompanied by "further factual enhancement" do not survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) (internal quotation marks and alteration omitted). Wise's fiduciary breach claim states conclusions about the Plan Administrators' alleged fiduciary breach—including assertions that the Plan Administrators failed to investigate, consult with qualified medical experts, or evaluate claims fairly—without alleging facts tending to show that any claim besides Wise's was mishandled or that the result of any such mishandling caused plan-wide injury. Accordingly, the district court properly dismissed Wise's second claim.[23]

In *Nalbandian*, the plaintiff baldly alleged an "unlawful scheme" in which the defendants "repeatedly, substantially, systematically and willfully violated their fiduciary responsibilities" by failing to properly interpret and apply plan provisions; asserting improper bases for denying benefits; and violating claims handling guidelines, among other things.[24] The district court dismissed that claim because it too lacked factual support and therefore failed to state a plausible claim for relief:

> Other than the specific allegations in connection with their denial of individual benefits claim (claim one of the FAC), Plaintiffs make no specific allegations as to what fiduciary obligations Defendants violated or how Defendants violated those obligations. These conclusory allegations are insufficient to support Plaintiffs' breach of fiduciary duty claim.[25]

The district court reached this decision cognizant of the general rule in ERISA cases, which is "to prevent individual benefits claims from being unnecessarily repackaged as breach of fiduciary

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[23] *Wise v. Verizon Communications, Inc.*, 600 F.3d 1180, 1189-90 (9th Cir. 2010).

[24] *See generally* 10/1/2010 First Am. Compl., *Nalbandian v. Lockheed Martin Corp.*, No. 5:10-cv-1242 (N.D. Cal.) (Ex. B) at ¶¶ 46-59.

[25] *Nalbandian v. Lockheed Martin Corp.*, No. 10-cv-1242, 2011 WL 338809, at *4 (N.D. Cal. Feb. 1, 2011).

obligation claims."[26] This Court should uphold the same principle and dismiss Dimry's breach-of-fiduciary-duty claims.

II. ADDITIONAL EQUITABLE RELIEF IS INAPPROPRIATE BECAUSE DIMRY SUFFERED ONLY ONE INJURY: A DENIAL OF BENEFITS.

Section 502(a)(1)(B) of "ERISA specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims . . . ."[27] Because Dimry's suit plainly turns on these very issues, section 502(a)(1)(B) should be Dimry's sole recourse.

As Dimry acknowledges, section 502(a)(3) is a "catchall" provision that merely "act[s] as a safety net" by "offering appropriate equitable relief *for injuries* caused by violations that § 502 does not elsewhere adequately remedy."[28] This principle is dispositive of Dimry's breach-of-fiduciary-duty claim because, unlike many of the cases allowing simultaneous 502(a)(1)(B) and 502(a)(3) claims, Dimry suffered one and only one injury: The Plan denied his application for benefits.[29]

Dimry tries in vain to explain how his 502(a)(1)(B) and 502(a)(3) claims address "two different actions"[30] taken by the Plan against him. The complete lack of factual support for Dimry's plan-wide breach-of-fiduciary-duty allegations—combined with the fact that he never claimed the Retirement Board breached its fiduciary duty when it relied on Plan neutral physicians to award him Line-of-Duty benefits in 2008—demonstrates that the Plan really took

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[26] *Nalbandian*, 2011 WL 338809, at *4.

[27] *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

[28] *Varity*, 516 U.S. at 512 (emphasis added). *See* Pl.'s Opp. at 8 (quoting *Varity*).

[29] *See, e.g.*, *Sconiers v. First Unum Life Ins. Co.*, 830 F. Supp. 2d 772, 778 (N.D. Cal. 2011) (denying motion for summary judgment on a 502(a)(3) claim, finding that the claim was based upon a separate theory, *i.e.*, that the defendant misrepresented which long term disability policy governed plaintiff's claim for benefits); *Echague v. Metropolitan Life Ins. Co.*, 43 F. Supp. 3d 994, 1013 (N.D. Cal. 2014) (permitting 502(a)(3) claim for equitable relief where 502(a)(1)(B) claim for benefits was directed at a fiduciary other than the claims fiduciary, and the claim was based on the separate allegation that the fiduciary failed to provide proper notice about continuation of life insurance coverage).

[30] Pl.'s Opp. at 10.

one action, and that Dimry suffered one, singular injury. But for the Plan's denial of Dimry's application for benefits, Dimry would have no complaint against the Plan whatsoever.

III. DIMRY IS NOT ENTITLED TO DISGORGEMENT AND HIS COMPLAINT DOES NOT SEEK INJUNCTIVE RELIEF.

Dimry's opposition focuses on two equitable remedies that he claims should be available to him through Count II: surcharge and injunctive relief. Neither is appropriate.

Dimry argues for surcharge as the equitable vehicle to disgorge the Plan's alleged profits or investment earnings on the amount of benefits withheld from him.[31] Surcharge is an equitable remedy often thrown about, but it is not available to a participant like Dimry, whose sole complaint is the denial of disability benefits. *Rochow* is the most recent and authoritative authority on this point. In that case, the Sixth Circuit, sitting *en banc*, soundly rejected disgorgement as an equitable remedy.[32] The Supreme Court denied *certiorari*, leaving intact a decision that, in the words of one district court within this circuit, "clearly precludes disgorgement under [section 502(a)(3)]."[33] Dimry points out that the Sixth Circuit's decision is not binding on this Court,[34] and that is true. But Dimry never explains his added charge that the *en banc* decision in *Rochow* is unpersuasive, nor is that the holding of the *Bush* case cited by Dimry.[35] This Court should follow the reasoning of *Rochow* and summarily reject Dimry's claim for disgorgement under section 502(a)(3).

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[31] *See* Pl.'s Opp. at 11 (discussing surcharge and arguing that "a plaintiff may seek disgorgement of profits under an (a)(3) claim").

[32] *See Rochow v. Life Ins. Co. of North America*, 780 F.3d 364, 372 (6th Cir.) ("If an arbitrary and capricious denial of benefits implicated a breach of fiduciary duty entitling the claimant to disgorgement of the defendant's profits in addition to recovery of benefits, then equitable relief would be potentially available whenever a benefits denial is held to be arbitrary or capricious. This would be plainly beyond and inconsistent with ERISA's purpose to make claimants whole."), *cert. denied*, 136 S. Ct. 480 (2015).

[33] *Talbot v. Reliance Standard Life Ins. Co.*, No. cv-14-231, 2015 WL 4134548, at *15 (D. Ariz. June 18, 2015).

[34] Pl.'s Opp. at 9.

[35] *See Bush v. Liberty Life Assurance Co. of Boston*, 130 F. Supp. 3d 1320, 1326-27 (N.D. Cal. 2015) (court rejected procedurally defective motion for reconsideration, and merely noted that *Rochow*—the sole basis for the defendant's motion—is not binding precedent).

Putting aside the question whether the injunctive relief described in Dimry's *opposition* is appropriate or necessary, the Court should reject Dimry's argument that the *Complaint* requests injunctive relief. Dimry says his Complaint "seeks appropriate injunctive relief to remedy" the Plan's alleged fiduciary breach,[36] but that is not true. The word "injunction" is mentioned only once on the final page of the Complaint, where it states that Dimry seeks "equitable and injunctive relief *as set forth above*."[37] Of course, injunctive relief is never "set forth above" or otherwise described in the Complaint.[38] Therefore, when it comes to injunctive relief, the Complaint fails even Dimry's modest requirement that it give the Plan notice of the nature of his claims and the relief sought.

CONCLUSION

This case is really about remedying the alleged wrongful denial of Dimry's application for benefits. Count I of Dimry's Complaint has the potential to provide Dimry adequate relief for that claimed injury. Count II is factually unsupported, and the remedies it seeks are either redundant of the remedies available to Dimry under section Count I or inappropriate as a matter of law. For these reasons, the Court should dismiss Count II of Dimry's Complaint with

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[36] Pl.'s Opp. at 12.

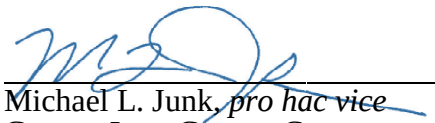
[37] Compl. at 9, prayer for relief ¶ 6 (emphasis added).

[38] *See* Compl. at 8 (specifying equitable relief sought in conjunction with Count II as disgorgement of profits, "make-whole relief, interest, attorneys' fees and other losses").

prejudice and allow this case to proceed in a straightforward fashion, on the administrative record, without all of the unnecessary distractions Dimry apparently hopes to introduce.

Dated: May 17, 2016

Respectfully submitted,



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